IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

STATE OF IOWA, STATE OF NORTH DAKOTA, et al., Plaintiffs, v. COUNCIL ON ENVIRONMENTAL QUALITY, and BRENDA MALLORY, in her official capacity as Chair, Defendants, and ALASKA COMMUNITY ACTION ON TOXICS, et al., and STATE OF WASHINGTON, et al., Intervenor-Defendants.	Case No. 1:24-cv-00089-DMT-CRH

PLAINTIFFS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S ORDER FOR ADDITIONAL BRIEFING

Plaintiff States submit this response to the Court's November 19, 2024 Order for supplemental briefing on the issue of whether CEQ has rulemaking authority from Congress to promulgate judicially enforceable rules. Dkt. 117. The Court issued that Order after the D.C. Circuit's November 12, 2024 decision in *Marin Audubon Soc'y v. Fed. Aviation Admin.*, No. 23-1067, 2024 WL 4745044 (D.C. Cir. Nov. 12, 2024) (slip op.), about which Plaintiff States notified this Court the next day. Dkt. 114 (Nov. 13, 2024). And for the reasons that the D.C. Circuit explained in *Marin*, Plaintiff States submit that the CEQ's lack of rulemaking authority is another reason that the 2024 Final Rule challenged in this action should be vacated.

As a threshold matter, Plaintiff States acknowledge they did not present that argument in their summary judgment briefing. But they disagree that the argument has been "forfeited." *Cf.*

Dkt. 116 (CEQ Response) (Nov. 18, 2024). Notably, the DC Circuit in *Marin* itself addressed this threshold issue despite the parties not raising it in any briefing there. *Marin*, 2024 WL 4745044, at *4 (acknowledging that while questions relating to CEQ's authority were addressed at argument, there was no pre- or post-argument briefing on the issue).

Moreover, as noted in this Court's Order, the "Court cannot disregard" CEQ's now-adjudicated lack of authority to issue regulations. Dkt. 117; *see also Marin*, 2024 WL 4745044, at *4 (given the structural Constitutional issues at play, "the parties cannot by consent cure the constitutional difficulty") (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986)). Courts have long recognized that "an agency literally has no power to act—including under its regulations—unless and until Congress authorizes it to do so by statute." *Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368, 378 (5th Cir. 2022). Consequently, Plaintiff States would have been remiss in their obligations to the Court *not* to inform the Court of new persuasive authority from the D.C. Circuit, which is directly on point here.

Furthermore, though Plaintiff States did not challenge CEQ's general rulemaking authority in their briefing, Plaintiff States' complaint and summary judgment briefing do challenge CEQ's 2024 Final Rule as *ultra vires* and dependent on non-binding Executive Orders and guidance. *E.g.*, Dkt. 65 at 22, 39. Plaintiff States also contrasted CEQ's inherently advisory role under NEPA to individual agencies implementing NEPA for their proposed major federal actions. *E.g.*, *id.* at 40 (citations omitted). And those are the same grounds that the D.C. Circuit invoked to defeat CEQ's general rulemaking authority. *Marin*, 2024 WL 4745044, at *3–9.

On the merits, the Court should adopt *Marin*'s reasoning because, simply stated, "[n]o statute confers rulemaking authority on CEQ." *Id.* at 7. As the D.C. Circuit explained, CEQ may only wield authority that is conferred by statute, absent which courts "*shall* . . . hold unlawful and

set aside" CEQ's actions as "promulgated without valid statutory authority." 5 U.S.C. § 706(2)(C) (emphasis added); *see also FEC v. Ted Cruz for Senate*, 596 U.S. 289, 301 (2022) ("An agency, after all, 'literally has no power to act'—including under its regulations—unless and until Congress authorizes it to do so by statute.") (citations omitted); Dkt. 65 at 10. And the Supreme Court has confirmed that this determination of statutory authority belongs to courts, not CEQ. *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024); *see also* Dkt. 65 at 10.

And while *Marin* involved different CEQ regulations, the same result holds for the Final Rule challenged here, because CEQ justified its act of rulemaking by invoking the same authorities that *Marin* determined to be insufficient—NEPA itself, the Environmental Quality Improvement Act, and Executive Order 11991, 42 Fed. Reg. 26,967 (May 25, 1977). *See* 89 Fed. Reg. 35442, 35555 (May 1, 2024) (40 C.F.R. § 1500.3); *Marin*, 2024 WL 4745044, at *7–9. Moreover, the Final Rule's preamble and the briefing CEQ submitted in this case rely on the same general policy provisions of NEPA and case law that *Marin* analyzed, and also invokes more Executive Orders on climate change and environmental justice (*e.g.*, Exec. Order Nos. 13990, 14008, 14096) and guidance documents that similarly lack the force of binding law. So, those further Executive Orders cannot support CEQ's assertion of rulemaking authority.

As *Marin* thoroughly addressed, the NEPA statute formally established CEQ in Title II, separate from Title I which sets forth NEPA's hortatory policies and operative procedural mandates. 42 U.S.C. §§ 4341–4347. Congress defined CEQ's role as merely advisory within the "Executive Office of the President." *Id.* § 4342; *id.* §§ 4343(1), (4), (8) ("duty and function" of CEQ includes to "assist and advise the President" on specific reporting, "develop and recommend to the President national environmental policies," and "make and furnish such studies, reports, thereon, and recommendations with respect to matters of policy and legislation as the President

may request"); *see also* Dkt. 65 at 40. Notably absent from Congress' prescription of CEQ's "duty and function" is any grant of rulemaking authority, as is typically found when Congress creates or designates a specific agency to carry out a statute. *See Marin*, 2024 WL 4745044, at *7 ("NEPA contains nothing close to the sort of clear language Congress typically uses to confer rulemaking authority."); *cf.* 16 U.S.C. § 1533(d) (directing U.S. Fish and Wildlife Service and National Marine Fisheries Service to issue "protective regulations" under the Endangered Species Act); 42 U.S.C. § 7411(b)(1)(A) (directing U.S. Environmental Protection Agency to issue "regulations" implementing aspects of the Clean Air Act). Where NEPA speaks to "administrative regulations," it is for individual "agencies of the Federal Government"—not CEQ—to ensure their actions are in "conformity" with NEPA. 42 U.S.C. § 4333.

By contrast, CEQ predicates its rulemaking authority on Executive Order 11991, 42 Fed. Reg. 26,967 (May 25, 1977). *See Marin*, 2024 WL 4745044, at *4 ("CEQ traces its rulemaking authority not to legislation but to an Executive Order of the President."). Notably, that Executive Order superseded prior Executive Order 11514 calling merely for "guidelines" in implementing NEPA, a call that conforms to CEQ's statutory role. 35 Fed. Reg. 4247, 4248 (Mar. 7, 1970). As *Marin* points out, courts at the time echoed CEQ's role as "merely advisory" to offer "non-binding suggestions to assist agencies in developing their own NEPA procedures." *Marin*, 2024 WL 4745044, at *5 (citations omitted). Regardless of the subsequent Executive Order's revised call for "regulations" in lieu of "guidelines," an "executive order is not 'law' within the meaning of the Constitution"—which is the purview of Congress under Article I of the U.S. Constitution, rather than of the President under Article II of the Constitution. *Id.* at *4 (citation omitted); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid

grant of authority from Congress. And in our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.") (internal quotation marks and citations omitted); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (the President cannot by order manufacture the "law-making power of Congress"); *Indep. Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 236 (8th Cir. 1975) ("[*Youngstown*] completely refutes the claim that the President may act as a lawmaker in the absence of a delegation of authority or mandate from Congress.") (citations omitted).

Accordingly, the D.C. Circuit correctly held that "[t]he CEQ regulations, which purport to govern how all federal agencies must comply with the National Environmental Policy Act, are *ultra vires*." *Marin*, 2024 WL 4745044, at *3. This Court should reach the same conclusion here.

The D.C. Circuit also rejected arguments that unexamined references in previous case law are capable of conferring CEQ with authority to promulgate NEPA-implementing rules. *Id.* at 8 ("The Supreme Court's pronouncements in this area cannot rescue CEQ's regulations."); *see also, e.g.*, Dkt. 65 at 20; Dkt. 98 at 11. For example, like Plaintiff States did in their briefing, the D.C. Circuit refuted that *Andrus v. Sierra Club* grants CEQ broad rulemaking authority. *Marin*, 2024 WL 4745044, at *8 (citing 442 U.S. 347, 358 (1979)). And in any event, the Supreme Court's decision in *Loper Bright* precludes courts' wholesale deference to CEQ. *See id.* Thus, courts' sporadic endorsements of particular CEQ interpretations, all in the context of adjudicating actions by individual agencies where CEQ was not a party, do not bestow CEQ with authority to promulgate NEPA-implementing rules..

Plaintiff States respectfully request that the Court grant their motion for summary judgment in its entirety and declare unlawful, vacate, and remand the Final Rule. The D.C. Circuit's recent

decision in *Marin* provides a further basis for so holding.[1]

Dated: November 19, 2024 Respectfully Submitted,

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[1] If the Court is inclined to grant an extension for additional briefing on the impact of the *Marin* decision, as requested by CEQ (Dkt. 118), Plaintiff States respectfully suggest that CEQ/Intervenors be directed to file any supplemental brief(s) responding to this brief, and that Plaintiff States be provided an opportunity to reply to such brief(s).

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